# Yap Nyo Nyok v Bath Pharmacy Sdn Bhd

HIGH COURT (KUCHING) — CIVIL APPEAL NO KG 27 OF 1991
CHONG SIEW FAI J
27 APRIL 1993

***Contract*** *— Terms — Implied terms — Whether termination term can be implied into a contract — Intention of parties — Business efficacy*

***Landlord and Tenants*** *— Determination — Sublease for a fixed term of ten years — Whether plaintiff entitled to terminate sublease prematurely*

***Landlord and Tenants*** *—Notice to quit — Three months' notice — Whether length of notice sufficient — Burden of proof on plaintiff*

***Words and Phrases*** *— 'Sooner determination'*

***Civil Procedure*** *— Pleadings — Necessity for express pleadings — Material facts not pleaded — Whether plaintiff should be allowed to adduce evidence of such pleading*

Tan Soi Lui ('Tan'), as administratrix of her late husband's estate, agreed to sublet a shophouse (which belonged to her husband ('Chong')) to the defendant for a term of ten years. The defendant entered into possession as tenant of the shophouse on 16 August 1988. Upon the death of Tan, one Joseph Chong was appointed as administrator de bonis non of Chong's estate. By a memorandum of sublease dated 15 July 1989, Joseph Chong as the administrator sublet the shophouse to the defendant for the remaining of the ten year term sublease. On 30 May 1989, Joseph Chong as the administrator entered into a sale and purchase agreement of the shophouse with the plaintiff, subject to the defendant's sublease. By a notice dated 27 December 1989, the plaintiff gave the defendant three months' notice to quit. Upon the defendant's failure to do so, the plaintiff instituted proceedings in the magistrates' courts claiming, inter alia, possession of the shophouse and for damages for alleged trespass. The magistrate dismissed the plaintiff's application, whereupon the plaintiff brought this appeal against the decision raising the following points of law:

(1) whether the plaintiff was entitled to prematurely terminate the sublease before its terms had fully expired; and
(2) whether the notice to quit served on the defendant was reasonable and good in law.

**Held**, dismissing the appeal:

(1) In cl 4 of the terms and conditions of the sublease, the words 'sooner determination' cover situations where conditions or covenants in the sublease provide for determination of the sublease

during its currency; they in themselves do not import or create an implied condition or covenant for the sublessor to determine the sublease before the expiration of the fixed term. If it is intended that there be an option for one or either of the parties to terminate a tenancy for a fixed term before its expiration, such option is normally provided for. It is not for the courts to imply covenants or stipulations which might and ought to have been expressed if intended.

(2) Generally, parties to a contract are taken to have incorporated therein all terms and conditions which they wanted. A term cannot be implied unless the parties must necessarily have intended it to be so and for a term to be implied in a contract, it must be both necessary to give business efficacy to the contract and obvious. Clause 4 of the agreement is capable of being effective and subsisting without the need of incorporating the implied covenant of the sublessor to determine the sublease during its currency and the test of 'necessary for business efficacy' does not necessitate the suggested covenant in favour of the sublessor to be implied by reason of the existence of cl 4.

(8) The onus lies on the plaintiff to establish that the length of the notice to quit given by it is sufficient. In this case, the court was of the view that the three months' notice to quit was inadequate and incapable of determining the lease.

**Obiter:**

All facts that are essential to constitute a cause of action must be alleged. Each party must plead all the material facts on which he means to rely at the trial. Although the defendant did not object to the plaintiff's failure to plead material necessary to support his claims, the plaintiff should not have been allowed to raise in his submission, any point or matter which is essential to his claim in the action and has not been pleaded, and respecting which no evidence has been adduced. The plaintiff could not be permitted to adduce any evidence of such pleading.

**[Bahasa Malaysia summary**

Tan Soi Lui ('Tan'), sebagai pentadbir harta pusaka mendiang suaminya ('Chong'), telah bersetuju memajak kecil sebuah rumahkedai (kepunyaan Chong) kepada defendan untuk tempoh sepuluh tahun. Defendan telah mengambil milikan sebagai penyewa rumahkedai itu pada 16 Ogos 1988. Apabila Tan meninggal dunia, Joseph Chong telah dilantik sebagai pentadbir de bonis non harta pusaka Chong. Melalui suatu memorandum pajakan kecil yang bertarikh 15 Julai 1989, Joseph Chong sebagai pentadbir, telah memajak kecil rumahkedai itu kepada defendan untuk baki pajakan kecil selama sepuluh tahun itu. Pada 30 Mei 1989, Joseph Chong sebagai pentadbir telah mengikat suatu perjanjian jualbeli rumahkedai itu dengan plaintif, tertakluk

kepada pajakan kecil defendan. Melalui suatu notis bertarikh 27 Disember 1989, plaintif telah memberi defendan suatu notis keluar dalam masa tiga bulan. Atas kegagalan defendan berbuat demikian, plaintif telah memulakan prosiding di mahkamah majistret untuk menuntut, antara lain, milikan rumahkedai itu serta gantirugi untuk tuduhan pencerobohan. Majistret telah menolak permohonan plaintif, dalam mana plaintif telah membuat rayuan terhadap keputusan itu dan membangkitkan perkara undang-undang seperti yang berikut:

(1) sama ada plaintif berhak untuk menamatkan pajakan kecil itu pramasa; dan
(2) sama ada notis keluar yang telah diserahkan oleh plaintif kepada defendan adalah munasabah serta baik dari segi undang-undang.

**Diputuskan,** menolak rayuan itu:

(1) Menurut fasal 4 dalam terma dan syarat pajakan kecil itu, perkataan-perkataan 'sooner determination' merangkumi situasi di mana syarat atau waad yang terkandung di dalam pajakan kecil itu memperuntukkan penamatan pajakan kecil itu dalam tempoh sahnya; tetapi penggunaan perkataan-perkataan tersebut dengan tersendiri tidak akan mewujudkan suatu syarat atau waad tersirat untuk membolehkan pemegang pajakan kecil menamatkan pajakan kecil itu sebelum tamatnya tempoh yang telah ditetapkan. Jika dimaksudkan bahawa satu atau mana-mana pihak mempunyai pilihan menamatkan suatu tenansi bagi suatu tempoh yang tetap sebelum tamatnya tempoh itu, kebebasan memilih sedemikian biasanya diperuntukkan. Mahkamah tidak patut memasukkan waad atau stipulasi tersirat yang mungkin atau yang seharusnya dinyatakan.
(2) Pada amnya, semua pihak kepada suatu kontrak dianggap sebagai telah memasukkan kedalam kontrak itu segala terma dan syarat yang mereka kehendaki. Sesuatu terma tidak boleh tersirat kecuali kesemua pihak bersetuju membuat sedemikian dan sesuatu terma hanya boleh tersirat ke dalam suatu kontrak jika ia dapat memberi 'business efficacy' kepada kontrak tersebut dan jika ianya jelas. Fasal 4 perjanjian itu boleh berkuatkuasa tanpa keperluan untuk memasukkan waad tersirat yang membolehkan pemberi pajakan kecil menamatkan pajakan kecil itu dalam tempoh sahnya dan ujian bagi 'necessary for business efficacy' tidak memerlukan waad tersirat yang dicadangkan yang memihak kepada pemberi pajakan kecil kerana kewujudan fasal 4.
(3) Beban membukti dipikul oleh pihak plaintif untuk menunjukkan bahawa tempoh masa yang diberi olehnya di dalam dalam notis keluar itu adalah memadai. Di dalam kes ini, mahkamah berpendapat bahawa tempoh tiga bulan yang diberi di dalam notis keluar itu tidak mencukupi dan tidak boleh menamatkan pajakan itu.

**Obiter:**

Semua fakta penting yang menjadi asas tindakan hendaklah dikemukakan. Setiap pihak mestilah mengemukakan kesemua fakta penting yang mereka ingin bergantung di dalam perbicaraan itu. Meskipun defendan tidak membantah terhadap kegagalan plaintif mengemukakan material yang diperlukan untuk menyokong tuntutannya, plaintif tidak seharusnya dibenarkan untuk mengemukakan dalam penyampaiannya, sebarang hal atau perkara yang penting kepada tuntutannya dalam tindakan ini yang langsung tidak dinyatakan, dan di mana keterangan juga tidak dikemukakan. Plaintif tidak akan dibenarkan untuk mengemukakan sebarang keterangan mengenai pliding yang sedemikian.]

**Notes**

For cases on implied terms in a contract, see 3 *Mallal's Digest* (4th Ed) paras 1565–1580.

For cases on the determination of a fixed term lease, see 9 *Mallal's Digest* (4th Ed) paras 817–819.

For cases on notices to quit, see 9 *Mallal's Digest* (4th Ed) paras 1119–1125.

For cases on the necessity for express pleadings, see 2 *Mallal's Digest* (4th Ed) paras 1753–1769.

**Cases referred to**

1 *Philipps v Philipps & Ors* (1878) 4 QBD 127 (refd)
2 *Bruce v Odhams Press Ltd* [1936] 1 All ER 287 (refd)
3 *Smith v Harwich (Mayor)* (1857) 2 CB (NS) 651 (refd)
4 *Re Berker Sportcraft's Agreements* (1947) 177 LT 420; 91 SJ 409 (refd)
5 *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592 (refd)
6 *Re Comptoir Commercial Anversois v Power, Son & Co* [1920] 1 KB 868 (refd)
7 *Liverpool City Council v Irwin & Anor* [1977] AC 239; (1976) 238 EG 879 (refd)
8 *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 16 ALR 363; (1977) 52 ALJR 20 (refd)
9 *Pasaraya Seri Sayang Sdn Bhd v Majlis Perbandaran Pulau Pinang* [1988] 3 MLJ 51 (distd)

*PS Lai* (*Tan & Lai Advocates*) for the plaintiff.
*P Phang* (*Reddi & Co*) for the defendant.

*Cur Adv Vult*

**Chong Siew Fai J**: This appeal by the plaintiff is against the decision of the Magistrate's Court at Kuching answering in the negative, the following two points of law raised in Summons No M/CIV/288/90/C. The two points are:

(a) whether the plaintiff is entitled to prematurely terminate the sublease before its term has fully expired; and
(b) whether the notice to quit dated 27 December 1989 served by the plaintiff on the defendant is reasonable and good in law.

The undisputed facts as disclosed in the pleadings and the affidavits filed constituting the background of the case may be summarized as follows:

Initially the shophouse, the subject-matter of the sublease, belonged to one Chong Tze Yew. Chong Tze Yew died, and his wife, Tan Soi Lui ('Tan') became the administratrix of his estate. As the administratrix, Tan and the defendant entered into two deeds both dated 12 May 1988 whereby, inter alia, Tan agreed to sublet the shophouse to the defendant for a term of ten years commencing from 16 August 1988 – 15 August 1998 at the monthly rental of RM1,000 for the first five years and RM1,250 for the remaining five years. Meanwhile, Tan, as the administratrix, also entered into a sublease with the defendant for subletting the shophouse for the term of ten years and the rental as aforesaid. The sublease was not registered with the land office because of the existence of two caveats, which also hindered the registration of the application for transmission of the shophouse to Tan. This unregistered sublease contained substantially terms and conditions found in one of the two deeds above-mentioned. The defendant entered into possession as tenant of the shophouse on 16 August 1988.

Tan passed away, and one Joseph Chong Vui Chiung @ Chong Kueh Ming was appointed administrator de bonis non of the estate of Chong Tze Yew on 15 March 1989. By a memorandum of sublease dated 15 May 1989, the said Joseph Chong as registered owner of the shophouse by virtue of his representative capacity sublet the shophouse to the defendant for the remaining term of nine years and three months (ie out of the ten-year term) from 16 May 1989 – 15 August 1998 at the same rental as previously agreed. This sublease was registered at the Kuching land office on 11 December 1989 as instrument L16031/1989 with the consent of the plaintiff as caveator who had lodged a caveat against the shophouse.

On 30 May 1989, the plaintiff and the said Joseph Chong, as the administrator, entered into an agreement for the sale of the shophouse to the plaintiff subject to the defendant's tenancy. In the agreement the plaintiff acknowledged notice of the defendant's tenancy for ten years and undertook not to terminate it prior to its expiry date on 31 August 1998. The memorandum of sublease was registered first, in point of time, as instrument L16031/1989 before the registration of the memorandum of transfer of the shophouse to the plaintiff in pursuance of the sale and purchase agreement (see para 5 of Wong Sie Sing's affidavit affirmed on 5 July 1991).

On 30 April 1990 the plaintiff instituted the action presently under appeal based on a three-month notice to quit dated 27 December 1989.

I would first make an observation on the statement of claim. In my opinion, the pleading, as it stands, is, putting it mildly, unsatisfactory. So far as is relevant, O 14 r 13 of the Subordinate Courts Rules 1980 provides:

(1) ... every pleading must contain, and contain only a statement in a summary form of the material facts on which the party pleading relies for his claim ...

A but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits.

(2) Without prejudice to paragraph (1), the effect of any document ... referred to in the pleading must, if material, be briefly stated, and the precise words of the document ... shall not be stated, except in so far as those words are themselves material.

B Thus, a statement of claim must contain all matters necessary to support the claims in an action.

In the instant case under appeal, the claims are, inter alia, for possession of the shophouse and for damages for alleged trespass. The statement of claim acknowledges the sublease for a fixed term of nine years and three C months commencing from 16 May 1989 (thus ending on 15 August 1998) and avers the giving of a notice to quit dated 27 December 1989 to deliver up possession of the shophouse 'on or before 31 March 1989 or at the end of the next complete calendar month of the tenancy after the service of the said notice on the defendant' and the service of the said notice on 29 D December 1989. None of the other clauses or provisions of the sublease was pleaded. And it was only during the hearing of the present application in the lower court that counsel for the plaintiff revealed for the first time that the plaintiff relied on an implied term alleged to arise under the sublease. Where a plaintiff's case rests on an implied term (eg an implied term of option to prematurely determine a contract or sublease, as in the E instant case), the proper practice is to allege such implied term or agreement as a fact, setting out the basis upon which the implied term is said to have arisen. All facts that are essential to constitute a cause of action must be alleged. *Philipps v Philipps & Ors* [1] stated the general rule as follows at p 139:

> But in my opinion it is absolutely essential that the pleading, not to be embarrassing F to the defendants, should state those facts which will put the defendants on their guard and tell them what they have to meet when the case comes on for trial.

And, in *Bruce v Odhams Press Ltd*[2] at p 294 Scott LJ said : 'The word "material" means necessary for the purpose of formulating a complete cause of action; and if any one "material" statement is omitted, the statement G of claim is bad.'

Each party must plead all the material facts on which he means to rely at the trial.

In the instant case the plaintiff has not pleaded material necessary to support his claim for possession and trespass.

On the face of the matters, standing alone, as pleaded in the statement H of claim, it appears to me gravely in doubt if the pleading could stand had O 14 r 21(1)(a) of the Subordinate Courts Rules 1980 been resorted to.

It is, however, noted that no objection was taken by the defendant on the above basis.

But even then, I do not think the plaintiff should have been allowed to I raise in his submission, any point or matter which is essential to his claim in the action and has not been pleaded, and in respect of which no evidence has been adduced. In fact I do not think he could be permitted to adduce any evidence of such unpleaded matter if he had attempted to. As Brett LJ said in *Philipps v Philipps*[1] at p 133:

> If parties were held strictly to their pleadings under the present system, they ought not to be allowed to prove at the trial, as a fact on which they would have to rely in order to support their case, any fact which is not stated in the pleadings.

On the above ground alone, the application ought, in my judgment, not to have been allowed to be proceeded with.

Assuming my above view is wrong, I now proceed to consider the two preliminary questions raised.

At the commencement of the hearing before me, the defendant abandoned his counterclaim for declaratory relief. The declaratory decrees sought ran counter to the substantial claim of the plaintiff and were beyond the jurisdiction of the magistrate's court (see s 93(1) read with s 69 of the Subordinate Courts Act 1948). And there is no indication that the defendant will not subsequently have the counterclaims transferred to the High Court for trial. This is another ground that the application ought not to have been allowed to proceed.

As regards the two preliminary questions raised:

(1) *Is the plaintiff entitled to prematurely terminate the sublease before its term has fully expired?*

As already pointed out, the sublease is for a fixed term of nine years and three months from 16 May 1989 – 15 August 1998. Then there are the following covenants and agreed provisions:

(a) Covenant by the sublessor for quiet enjoyment which runs as follows:

> That the sublessee punctually paying the rent hereby reserved and performing and observing the several covenants and stipulations on the sublessee's part herein contained shall peacefully hold and enjoy the demised premises during the term hereby created without any interruption by the sublessor or any person rightfully claiming under or in trust for the sublessor (cl 1 of Pt III of the sublease).

(b) [Part IV of the sublease states:]

> Provided always and it is hereby mutually agreed as follows:
>
> ...
>
> 2 In case the demised premises or any part thereof shall at any time during the term hereby granted be destroyed or damaged by fire explosion or any other cause beyond the control of the sublessee so as to be unfit for occupation or use, then and in every such case the sublessor, if the sublessor thinks fit, shall be at liberty by notice in writing to determine the term hereby granted and upon such notice being given the term hereby granted shall absolutely cease and determine.
>
> ...
>
> 4 In the event the sublessor terminating this sublease before its term has fully expired and the sublessee not being in breach of any of the terms of and conditions of this sublease, then the sublessor shall compensate the sublessee for all the losses he may have suffered as a result of the termination, except the loss of future earning from business.

As to the construction of the said cl 4, I agree that it must be construed according to the intent of the parties. By intent, however, is meant the

intention which is expressed by the meaning of the words used in the sublease and is not what it may be supposed that the parties wished to effect. The express words used in the clause must be given their natural ordinary meaning unless it appears from the context that by so doing they are being used in a sense different from that in which the parties intended to use them, or unless, by so using them, a manifest inconsistency results which could not have been the intention of the parties. It is not disputed that in its natural and ordinary meaning, the wording in the said cl 4 does not expressly create or confer an option exercisable by the sublessor (plaintiff). It is a mere consequential provision which will be applicable upon termination of the sublease by the plaintiff before the expiration of the term. It contains no express option exercisable by the plaintiff.

For the plaintiff it was firstly contended that from the words 'sooner determination of this sublease' in cl 9 of Pt II of the sublease, there should be implied a clause permitting the sublessor to determine the sublease before the expiration of the fixed term. With respect, I am unable to agree. Clause 9 is a covenant to yield up the shophouse. It reads:

> At the expiration or sooner determination of this sublease to yield up the demised premises to the sublessor in such good and reasonable repair as shall be in accordance with the covenants of the sublessee hereinbefore contained.

In my opinion, the words 'sooner determination' cover situations where conditions or covenants in the sublease provide for determination of the sublease during its currency; they, in themselves, do not import or create an implied condition or covenant for the sublessor to determine the tenancy before the expiration of the fixed term.

Next, it was submitted that to give business efficacy to the said cl 4 and to render it workable, the court must and it was reasonable and equitable to imply the term for pre-termination having regard to the sublease as a whole, and more particularly the said cl 4 which provides compensation to the sublessee.

Where a tenancy is created for a fixed term, the tenancy is for the fixed term. If it is intended that there be an option for one or either of the parties to terminate the tenancy before the expiration of the term created the option is normally expressly provided. It is not for the courts to imply covenants or stipulations which might and ought to have been expressed if intended. As stated in *Smith v Harwich (Mayor)*[3] at p 669:

> ... it is not competent to the court to make a contract for the parties which they have not thought fit to make for themselves, or to import a covenant which does not arise by fair and necessary implication from the language they have used.

Generally speaking, parties to a contract are taken to have incorporated therein all terms and conditions which they wanted. And, where an agreement already contains terms for termination, during the currency of the agreement, the onus lies on the person (the plaintiff in our instant case) who contends that a further such term ought to be implied, and it will be difficult in such situation to imply further such term. (See for example *Re Berker Sportcraft's Agreements.*[4]

In our present case, should a covenant for the termination of the sublease before the expiration of the fixed term as suggested by the plaintiff be implied? A

In *Reigate v Union Manufacturing Co (Ramsbottom) Ltd*[5] at p 605, Scrutton LJ said:

> The first thing is to see what the parties have expressed in the contract; and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties, 'What will happen in such a case,' they would both have replied, 'Of course, so and so will happen; we did not trouble to say that; it is too clear'. Unless the court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed. B C

In other words a term cannot be implied unless the parties must necessarily have intended it such that both would have answered, 'Oh of course', to an officious bystander had he suggested it in negotiation. D

In *Re Comptoir Commercial Anversois v Power, Son and Co*[6] Scrutton LJ remarked at pp 899–900:

> The court ... ought not to imply a term merely because it would be a reasonable term to include if the parties had thought about the matter, or because one party, if he had thought about the matter, would not have made the contract unless the term was included; it must be such a necessary term that both parties must have intended that it should be a term of the contract, and have only not expressed it because its necessity was so obvious that it was taken for granted. E

In *Liverpool City Council v Irwin & Anor*,[7] Lord Wilberforce said at p 254: 'In my opinion such obligation should be read into the contract as the nature of the contract itself implicitly requires, no more or less; a test, in other words of necessity.' And, Lord Edmund-Davis said at p 266: 'The touchstone is always necessity and not merely reasonableness.' F

A more concise statement of law on the subject was propounded in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council*[8] where Lord Simon of Glaisdale delivering the opinion of the board said at p 376: G

> ... for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract. H

Thus, for a term to be implied in a contract, it must be both necessary to give business efficacy to the contract and obvious.

In the instant case under appeal, cl 4 provides: 'In the event the sublessor terminating this sublease before its term has fully expired and the sublessee not being in breach of any of the terms of and conditions of this sublease', compensation for losses shall be paid by the sublessor (with certain I

exception). But it does not specify the circumstances under which the sublessor may terminate the sublease. Now applying the test of business efficacy, is it really necessary to imply the term of an option enabling the sublessor to determine the tenancy before the expiration of the fixed term because of the above-quoted wording in cl 4, ie: 'In the event the sublessor ... and conditions of this sublease'? For this purpose, the whole sublease has to be looked into, particularly, in my mind, cl 2 of Pt IV of the sublease. The said cl 2 permits the sublessor to determine the sublease by notice on the happening of certain events (ie destruction or damage of the shophouse or any part thereof by fire explosion or *any other cause beyond the control of the sublessee* thereby rendering the shophouse unfit for occupation or use). Like cl 4, cl 2 clearly contemplates situations or causes respecting which the sublessee is not at fault or in breach. However, cl 2 gives no remedial or compensatory provisions. In other words, whereas cl 4 stipulates compensatory provision to the sublessee in the event of the sublessor terminating the sublease before the fixed term, without *specifying the circumstances under which the sublessor may terminate the sublease*, cl 2, on the other hand, sets out circumstances under which the sublessor may terminate the sublease by notice before expiration of the fixed term, but without reserving or containing any provisions for rights and remedies of either party.

In the circumstances, having regard to the two clauses, can it be said with any reasonable certainty that there can be no doubt of the necessity for business efficacy to imply an option exercisable by the sublessor to determine the tenancy before the contractual fixed period? I do not think so. For example, the shophouse may be destroyed or damaged rendering it unfit for occupation or use by a cause that is beyond the control of the sublessee but attributable to the fault of the sublessor in which event cl 4 may become applicable. Had cl 2 itself contained express provision on remedies, there would have been a more probable case for rendering cl 4 separable from cl 2; but that is not the case. The phrase 'In the event the sublessor terminating ... and the sublessee not being in breach of any of the terms and conditions of this sublease', in cl 4 may well fit into situations (though not necessarily all situations) where the sublease is terminated thereby bringing the said cl 4 into operation.

In my judgment, cl 4 is capable of being effective and subsisting without the need of incorporating the implied covenant of the sublessor to determine the sublease during its currency and the test of 'necessary for business efficacy' does not necessitate the suggested covenant in favour of the sublessor to be implied by reason of the existence of cl 4. The covenant ought not be implied.

It was pointed out that the 'compensatory' provisions (cll 3 and 4) were bilateral. That, of course, is a factor to take into account together with all other relevant clauses in the sublease. However, the issue before the court is the implication of the option for the sublessor to determine the tenancy during its currency. The inter-relation of cll 2 and 4 as stated above, in my opinion, outweighs the existence of the said cl 3 in considering the issue aforesaid.

(2) *As regards to the second preliminary point of whether the notice to quit dated 27 December 1989 was reasonable and good in law.*

In the view that I hold of the first preliminary point, ie that no option to prematurely terminate the sublease before its term has fully expired is to be implied from the said cl 4, the said notice to quit was inoperative in law and did not terminate the sublease in this case.

But assuming my conclusion on the first point is wrong, the onus lies on the plaintiff to establish that the length of the notice to quit of three months is sufficient. For the plaintiff, counsel relied on *Pasaraya Seri Sayang Sdn Bhd v Majlis Perbandaran Pulau Pinang.*[9] There, the facts are different: the tenant failed to pay rental even after notice and the question of forfeiture arose. I do not think the point therein decided is applicable in the instant case. In our present case, the sublease is for a fixed term of nine years and three months. The plaintiff at all material times had knowledge of the previous arrangement of the ten-year tenancy between her predecessor and the defendant. There is uncontroverted evidence that the defendant had expended considerable sum of money in renovating the shophouse which was rented to run the business of a pharmacy (paras 13 and 15 of Wong Sie Sing's affidavit made on 5 July 1991 at p 86 of the appeal record). In the circumstance, I am of the view that the three months' notice to quit is inadequate and incapable of determining the sublease.

For the above reasons which are different from that of the learned trial magistrate, I dismiss the appeal with costs to the defendant/respondent. In the absence of an agreement, such costs are to be taxed.

*Appeal dismissed.*

Reported by Lim Chee Wee